PP

v.

LEONG CHEN KONG

HIGH COURT SABAH & SARAWAK, SANDAKAN
RICHARD MALANJUM J
[CRIMINAL APPEAL NO: S42-16-1997]
18 NOVEMBER 1999

CRIMINAL PROCEDURE: *Prosecution - Close of prosecution - Standard of proof - Prima facie case or proof beyond reasonable doubt - Criminal Procedure Code, s. 180*

CRIMINAL PROCEDURE: *Retrial - When to be ordered - Factors to be considered*

The respondent was alleged to have approved a trading licence to his brother to operate a four-digit gambling outlet whilst he was deputy president of the Sandakan Municipal Council. He was charged with an offence of corrupt practice, punishable under s. 2(1) of the Emergency (Essential Powers) Ordinance 22 of 1970.

The respondent was acquitted at the close of the prosecution case as the Sessions Court judge held that there was no *prima facie* evidence that the respondent was a public officer as defined under s. 2 of the Prevention of Corruption Act 1961 ('the PCA') although there was proof that he had committed a corrupt practice. The prosecution appealed ('the first appeal') and the High Court allowed the appeal, ordering the respondent to enter his defence on the basis that there was a *prima facie* case to answer. The trial resumed and at the close of the defence case, the sessions court judge acquitted and discharged the respondent, holding that the prosecution had failed to prove its case beyond a reasonable doubt.

The prosecution appealed again. It conceded that the test used for the standard of proof was wrong, as the correct test then was 'beyond reasonable doubt' and not *'prima facie',* and urged the court to order a retrial.

Held:

[1] Due to the confusion caused by the amendment to s. 180 of the Criminal Procedure Code ('the CPC') on 31 January 1997 and the directive issued on behalf of the Chief Justice, the test applied by the Sessions Court and the High Court in the first appeal, *ie*, the *prima facie* test, was wrong and a misdirection in law. The test applicable should have been one of 'beyond reasonable doubt'.

[2] Whether a court should order a retrial is a matter of discretion, taking into account factors such as the interests of justice, history of the case, prejudice to the defendant and the evidence adduced.

[3] A retrial is generally ordered where a fundamental defect in the proceedings has rendered the trial a nullity. It will not be ordered where the prosecution has failed to present its case properly. With hindsight, the appropriate course the court should have taken in the first appeal was to order a retrial, as the misdirection was so serious that it could not be cured by s. 422 of the CPC.

[4] An appellate court should be slow to interfere with the findings of fact by a trial court. As the trial court was not satisfied of the respondent's guilt beyond a reasonable doubt, there was no reason for the appellate court to interfere by ordering a retrial.

[5] In view of what had occurred in the course of the trial and considering that the respondent had been acquitted and would be burdened in terms of time, anxiety and added legal expense if a retrial was ordered, the court refused to order a retrial.

[Appeal dismissed.]

Case(s) referred to:

Adzhaar Ahmad & Anor v. PP [1996] 4 MLJ 85 ***(refd)***
Arulpragasan Sandaraju v. PP [1997] 1 CLJ 686i ***(foll)***
Bahruni Ismail v. PP [1997] 3 CLJ 267 ***(foll)***
Chee Chiew Heong v. PP [1981] 2 MLJ 287 ***(foll)***
Dalip Bhagwan Singh v. PP [1997] 4 CLJ 645 ***(foll)***
Goi Ching Ang v. PP [1998] MLJ 545 ***(foll)***
Khoo Hi Chiang v. PP [1994] 2 CLJ 151 ***(foll)***
Mahadi v. PP [1970] 1 MLJ 16 ***(refd)***
Matukdhari Singh v. Janardan AIR [1966] SC 356 ***(refd)***
Michael Ben Anak Panggi v. PP [1979] 2 MLJ 65 ***(refd)***
Mohd Amin Abdullah v. PP [1998] 2 CLJ 763 ***(refd)***
Ooi Lean Chai v. PP [1991] 2 CLJ 1304 ***(refd)***
Patrick John v. DPP [1985] 1 WLR 657 ***(foll)***
PP v. Wan Razali Kassim [1970] 2 MLJ 79 ***(foll)***
Raffi Mohd Tan Abdullah v. PP [1995] MLJ 119 ***(foll)***
Rex v. Grondkowski [1946] 1 KB 369 ***(refd)***
Ross v. The Queen (JC) [1957] AC 208 ***(refd)***
Sallehuddin Yahya v. PP [1979] 2 MLJ 138 ***(foll)***
Surandran Rajaretnam v. PP [1998] 2 CLJ 207 ***(foll)***
Tan Boon Hock v. PP [1979] 1 MLJ 236 ***(foll)***
Tan Boon Kean v. PP [1995] 4 CLJ 456 ***(refd)***
Zahari Yeop Baai & Anor v. PP [1980] 1 MLJ 160 ***(foll)***

Legislation referred to:
Criminal Procedure Code, ss. 180, 422
Prevention of Corruption Act 1961, s. 2
Trade Licensing Ordinance (Sabah), s. 3(1), (3)

For the appellant - Saiful Idris Zainuddin DPP
For the respondent - Alex Khoo; M/s Peter Lo & Co

Reported by Anne Khoo

JUDGMENT

Richard Malanjum J:

The matter before me was an appeal by the prosecution against the decision of the learned Session Court Judge (SCJ) acquitting the respondent at the end of the defence case on an amended charge that reads as follows:

> Bahawa kamu antara 28hb. Julai, 1992 hingga 30hb. Julai, 1992 di Pejabat Majlis Perbandaran Sandakan di dalam Daerah Sandakan, di dalam Negeri Sabah, sebagai seorang penjawat awam iaitu Timbalan Presiden Majlis Perbandaran Sandakan telah, semasa menjadi penjawat awam tersebut, melakukan perbuatan rasuah dengan menggunakan jawatan awam kamu itu untuk faedah kamu iaitu, kamu telah meluluskan satu lesen berniaga untuk menjalankan perniagaan 4 Digit Lottery Sale For 88 Lotteries Corporation kepada Syarikat Nasip beralamat di MDLB 1631, Taman Hin Wah, Batu 8, Jalan Labuk, Sandakan, di mana pada pengetahuan kamu, pada masa material syarikat tersebut dimiliki oleh adik kamu iaitu Leong Tsen Hin @ Robert dan dengan itu kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah Seksyen 2(1) Ordinan 22 (Kuasa-kuasa perlu) Dharurat, 1970.

During the hearing learned counsel for the respondent submitted, *inter alia,* that the decision of the learned SCJ should be affirmed as even the standard of proof that was relied upon at the end of the prosecution case was in error in that *in lieu* of the then prevailing standard of 'beyond reasonable doubt' the test relied upon was on '*prima facie*'. This led to the learned Deputy Public Prosecutor in his reply to concede that the test used was wrong. He therefore urged this court to order a retrial in the interests of justice as to him the evidence adduced against the respondent was 'overwhelming'. As expected learned counsel for the respondent objected strenuously contending that it would be highly prejudicial to the respondent if a retrial is ordered. One reason given was that it was alleged that the prosecution had failed to prove that the signature in the impugned approval was that of the respondent. Learned counsel submitted that if a retrial were to be ordered the prosecution would have a second 'bite of the cherry'. He further argued that to order a retrial would mean that the

prosecution could therefore correct whatever errors might have been committed in the first trial to the detriment of the respondent. Hence the issue that was left for me to consider was whether or not I should order a retrial. And in my ex-tempore judgment given on 18 November 1999 I refused to order a retrial. I stated that I would give my reasons later. I do so now.

Before going into the crux of the matter I think I should outline briefly the undisputed factual events that led to the prosecution of the respondent and what transpired in the course of his trial.

The respondent was then the deputy president of the Sandakan Municipal Council (SMC) duly assuming the office on 16 March 1991. But prior to that he acted on the post since 4 January 1988. In July 1992 his brother Leong Tsen Hin @ Robert applied for a trading license to operate a 4-digit outlet, a gambling business. The respondent gave the approval. But at that point in time he was yet to be appointed as a licensing authority under the Trade Licensing Ordinance of Sabah (TOL). It was only in 1995 that the respondent was gazetted as a licensing authority pursuant to Gazette Notification No. P.U.(B) 531 dated 26 October 1995. On 16 July 1996 the respondent was charged in the Sessions Court Sandakan for approving the trading license to his brother. He pleaded not guilty.

The trial began on 2 December 1996 and at the end of the prosecution case the learned SCJ acquitted and discharged the respondent basically on the ground that "the prosecution has failed to lead *prima facie* evidence to show that the accused is a public officer as defined under s. 2 of the Prevention of Corruption Act 1961 (PCA 1961)". On the other ingredient of the offence, namely, corrupt practice the learned SCJ found thus:

> The fact that he went ahead in issuing the trading license proves that he had committed a corrupt practise *(sic)* as envisaged under s. 2 of the ordinance.

The prosecution appealed (the 1st appeal) and in my judgment delivered on 1 August 1997 I allowed the appeal and ordered the respondent to enter on his defence. In my judgment I said, *inter alia*,:

> Similarly, it is my view that on the whole of the Prosecution evidence, a *prima facie* case has been established against the Respondent which if unrebutted would warrant his conviction.

The respondent did not appeal against that judgment. The trial therefore resumed on 11 November 1998 and at the end of the defence case the learned SCJ acquitted and discharged the respondent. And that resulted in the prosecution appealing to this court.

At this juncture I think it is opportune that I should state the background and reason for relying on the test as applied at the end of the prosecution case, at least in my judgment in the 1st appeal.

In the case of *Khoo Hi Chiang v. PP* [1994] 2 CLJ 151; [1994] l MLJ 265 it was held by the then Supreme Court that the test to be applied at the end of the prosecution case must be 'beyond reasonable doubt' before calling for the defence. That was further enhanced by the case of *Arulpragasan a/l Sandaraju v. Public Prosecutor* [1997] 1 CLJ 686i; [1997] 1 MLJ 389 after doubt was expressed on the correctness of *Khoo Hi Chiang's* case *(supra)* in *Tan Boon Kean v. Public Prosecutor* [1995] 4 CLJ 456; [1995] 3 MLJ 514.

Subsequent to the decision in *Arulpragasan (supra)* Parliament in its wisdom felt that amendment to s. 180 of the Criminal Procedure Code was necessary. That section formerly reads as thus:

> When the case for the prosecution is concluded the Court, if it finds that no case against the accused has been made out which if unrebutted would warrant his conviction shall record an order of acquittal, or if it does not so find, shall call on the accused to enter on his defence.

Hence pursuant to Act A 979/97 that section was therefore amended and now reads:

> 180. Procedure after conclusion of case for prosecution.
>
> (i) When the case for the prosecution is concluded, the Court shall consider whether the prosecution has made out a *prima facie* case against the accused.
>
> (ii) If the Court finds that the prosecution has not made out a *prima facie* case against the accused, the Court shall record an order of acquittal.
>
> (iii) If the Court finds that a *prima facie* case has been made out against the accused on the offence charged the Court shall call upon the accused to enter on his defence.

The amendment was effective from 31 January 1997. Arising therefrom the registrar of the High Court of Sabah and Sarawak on behalf of the Chief Judge issued a letter dated 3 March 1997 (the said letter) and making reference to a letter issued by the Chief Justice of the Federal Court. In para. 3 of the said letter the registrar wrote:

> 3. Semua kes-kes jenayah yang belum di bicarakan, atau yang belum habis dibicarakan, hendaklah dijalankan dengan megikut kehendak undang-undang sebagai dipinda oleh Akta A 979 tersebut.

(Freely translated it reads: 'All criminal cases that are yet to be heard or part-heard are required to comply with the requirements of the law as amended by Act A979'.)

The said letter was addressed to judges and judicial commissioners of the High Court as well as to the Sessions Court judges and magistrates of Sabah and Sarawak.

With such a letter though not taken as the judicial pronouncement of the law it should not therefore be surprising that the test as prescribed in the amendment was applied at that time. And although there was already the decision in *Bahruni bin Ismail v. Pendakwa Raya* [1997] 3 CLJ 267; [1997] 2 MLJ 265 rendered in February 1997 it would appear that the said letter did not take that into account. In that case it was held that:

> At the close of the case for the prosecution in the instant case, although the learned judge had not expressed in so many words, it is obvious to us that he applied the standard of proof as interpreted in *Munusamy v. PP* [1987] 1 MLJ 492. At that time, the interpretation of s. 180 of the CPC was as decided in that case. Following that decision, the standard of proof was the *prima facie* standard. The learned judge cannot be faulted for this as at that time that was the only interpretation of s. 180 of the CPC. We now agree with the submission of counsel for the appellant, as conceded to by the learned DPP, that in view of the majority decision in *Arulpragasan*, it must be taken that the interpretation of s. 180 all along ought to have been the beyond reasonable doubt standard and not the *prima facie* standard.
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> While we appreciate that s. 180 of the CPC has now been amended to provide for a *prima facie* standard of proof at the close of the case for the prosecution, it cannot be gainsaid that that amendment has no retrospective effect. There is nothing in the amendment itself to even suggest this. Therefore, it is never in doubt that Parliament in its wisdom has not made it retrospective. Both the learned DPP and the learned counsel for the appellant conceded this. Therefore, the amendment having been gazetted on 30 January 1997 would for all practical purposes come into effect only on 31 January 1997. Thus, the amendment would only be **applicable to cases filed after** that date and *not to cases before that date and this would include decided cases pending appeal. In all cases before 31 January 1997, the beyond a reasonable doubt standard of proof must of necessity apply as all along there can be only one interpretation of s. 180 of the CPC,* and that is as decided by the majority decision in *Arulpragasan.* per Shaik Daud JCA at page 270. (emphasis added).

The above case was followed by other cases but one clear decision was that of the Court of Appeal in the case of *Surandran a/l Rajaretnam v. Public Prosecutor* [1998] 2 MLJ 49 where it was also Shaik Daud JCA who expressed the view of the court at p. 52 thus:

The learned deputy public prosecutor while conceding that the learned sessions judge did not apply the beyond reasonable doubt standard, further contended that, whatever be the standard of proof applied, whether *prima facie* or beyond reasonable doubt standard, the sessions judge would have arrived at the same decision.

With respect, we are unable to agree with this submission. The issue in this appeal is not as contended by the learned deputy public prosecutor. The issue is whether the learned sessions judge applied the right and proper standard of proof at the close of the case for the prosecution.

The issue of whether the prosecution at the close of its case is required to prove a *prima facie* case or to prove a beyond a reasonable doubt case has been of great controversy for a number of years. As stated in *Bahruni bin Ismail v. PP* [1997] 2 MLJ 265, 'without embarking into the history on this issue all over again' it has now finally come to rest with the decision in *Arulpragasan a/l Sandaraju v. PP* [1997] 1 MLJ 1 where at p. 12 of the report it was held that the standard of proof at the close of the case for the prosecution is beyond reasonable doubt. Therefore, in the light of this decision, to all intents and purposes, the standard of proof to be applied in all cases whether before or after *Arulpragasan's* decision, must necessarily be beyond reasonable doubt.

It would not be amiss to add here that since *Arulpragasan's* decision, s. 180 of the Criminal Procedure Code (FMS Cap 6) has been amended to provide for a *prima facie* standard of proof at the close of the case for the prosecution. **This amendment, unfortunately for this case, took effect only after 31 January 1997 and there is nothing in the amendment to give it retrospective effect.**

Therefore, in the instant appeal, we were unanimously in agreement with the submission of Mr Karpal Singh that the learned sessions judge erred in law when he applied the *prima facie* standard of proof at the close of the case for the prosecution. We held that there was clear misdirection by the trial judge. We also held that a misdirection of this nature, which goes to the very root of the matter, is incapable of being cured by the provision of s. 422 of the Criminal Procedure Code, as the misdirection involves a principle of general importance in the administration of justice.

In the light of this, we allowed the appeal, quashed the conviction, set aside the sentence imposed and ordered a retrial before another sessions judge. We also ordered the penalty, if paid, to be refunded. (emphasis added).

I paused to note here that in that case an order of retrial was made after setting aside the conviction and sentence imposed by the trial court.

The issue of which appropriate test to apply surfaced again before the Federal Court in the case of *Dalip Bhagwan Singh v. Public Prosecutor* [1997] 4 CLJ 645; [1998] 1 MLJ 1. But in that case and unlike the decision in *Bahruni (supra)*, which made reference to 'cases filed'; it was held that (at pp. 16-17):

> The said amendment would apply, in our view, only to an act or omission constituting a criminal offence committed on or after 31 January 1997, and not to any such act or omission before 31 January 1997. For such act or omission committed before 31 January 1997, the test laid down in *Arulpragasan's* case, ie that of proof beyond a reasonable doubt at the close of the prosecution's case, would still apply. We have to and we would presently give our reasons for saying so. Parliament has plenary power to make retrospective criminal and civil law *vide Loh Kooi Choon v. Government of Malaysia* [1977] 2 MLJ 187, but when it makes such retrospective criminal law, it must steer clear of art 7, or for the purpose of the instant case, art 7(1) of the Federal Constitution.
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> The said amendment is not couched in terms, either expressly or by necessary implication, which would make it retrospective in operation, therefore the infringement of the said art 7(1) does not appear to arise.
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> Assuming that the said amendment had been, expressly or by necessary implication, made to apply retrospectively, it would have run foul of art 7(1) of the Federal Constitution in the manner mentioned below. Article 7(1) reads as follows:
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> > No person shall be punished for an act or omission which was not punishable by law when it was done or made, and no person shall suffer greater punishment for an offence than was prescribed by law at the time it was committed.
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> The said amendment if enacted to operate retrospectively would have so run foul because if an act or omission before 31 January 1997 cannot evidentially be proved at any time to have been committed beyond a reasonable doubt at the close of the prosecution's case, the perpetrator of the act or omission would not be called for his defence and therefore would not be punishable any more. But if the act or omission in question not punishable in the way stated above can be proved by way of a *prima facie* case at the close of the prosecution's case (a much lesser burden of proof), then the said perpetrator will have his defence called. He will then be in jeopardy of failing possibly to throw or cast a reasonable doubt on the prosecution's case, and such failure will be punished in a manner as provided by law. Article 7(1) of Federal Constitution would thereby have been infringed, though very clearly in spirit if not by letter.
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> The said amendment could be viewed from another angle which this court should not blinkered from seeing.

> We have mentioned elsewhere often that in connection with any legislation on substantive matters of laws that there is a rule of presumption that it is not retrospective in operation, in the absence of a contrary intention by express words or necessary implication. But on any legislation on evidence or on procedure, there is a twist of such rule of presumption, this time round, the presumption now is that such legislation is retrospective in operation in the absence of a contrary intention thereto by express words or necessary implication, subject to one exception as follows.
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> The exception is that such presumptive retrospective operation would not apply when the effect of applying retrospectively such legislation on procedure or on evidence would be to deprive a person of a vested right in civil cases or in criminal cases (as in this criminal reference before us) when it would offend against art 7(1) of the Federal Constitution. Viewed from the said angle therefore, art 7(1) would still have the effect of barring the retrospective criminal law on evidence or procedure to the extent in art 7(1) despite such a twist of the rule of presumption. Thus, it would be of no avail for anyone to contend that the said amendment in question, being by its nature, procedural or evidential, would operate retrospectively even if it is not a cast in retrospective terms. (emphasis added).

Hence, the test to be applied at the end of the prosecution case and before calling for the defence in act or omission rendering an offence prior to 31 January 1997 is that of 'beyond reasonable doubt'.

In the present case it was not in dispute that the act complained of was committed in 1992. And even the charge was filed before 31 January 1997. Accordingly the test applicable at the end of the prosecution case should have been one of 'beyond reasonable doubt'. The test as applied by the trial court as well as in the 1st appeal, namely, on *prima facie* at the end of the prosecution case was therefore wrong and misdirection in law.

I now come to the main question: should I order a retrial?

To answer that question there are several factors that need to be taken into account. After all a retrial may be ordered for 'a variety of reasons which it is hardly necessary or desirable to state in a set formula and the observations of one particular court are illustrative but not exhaustive'. (see: *Matukdhari Singh v. Janardan* AIR [1966] SC 356). Nevertheless there are common denominators namely:

(a) That it is a matter of discretion whether or not to order a retrial. (see: *Tan Boon Hock v. Public Prosecutor* [1979] 1 MLJ 236; *Sallehuddin bin Yahya v. Public Prosecutor* [1979] 2 MLJ 138);

(b) That how such discretion is to be exercised would depend upon the particular circumstances of the particular cases coming before an appellate court. But in exercising that discretion it must be done judiciously bearing in mind, *inter alia*, the interests of justice. Even the history of the case could be considered as was done in *Michael Ben Anak Panggi v. Public Prosecutor* [1979] 2 MLJ 65;

(c) That there must also be no undue prejudice to the accused if a retrial is ordered. (see: *Sallehuddin bin Yahaya v. Public Prosecutor (supra)*). An instance of prejudice may be where a retrial will enable the prosecution to fill a gap in the evidence which had been due to its own default. (see: *Ross v. The Queen* (JC) [1957] AC 208); and

(d) That it may be necessary as well for the appellate court to consider the case as a whole, in particular as regards the evidence adduced thus far and whether there has been decision on point of law or evidence which is wrong in law before deciding whether or not to order a retrial. (see: *Patrick John v. DPP* [1985] 1 WLR 657 (PC)).

And the following are some of the cases that may provide illustrations on how the courts determine whether or not to order retrial. In the case of *Adzhaar bin Ahmad & Anor v. Public Prosecutor* [1996] 4 MLJ 85 the cumulative effect of the various errors in the judgment of the trial court thereby occasioning a miscarriage of justice was a reason given by the court to allow the appeal and refusing a retrial as such exercise would serve no purpose. Indeed a retrial is in fact a fresh trial and generally ordered where the defect is so fundamental as to render the first trial a nullity. (see: *Ooi Lean Chai v. Public Prosecutor* [1991] 2 CLJ 1304; [1991] 2 MLJ 552).

In the case of *Chee Chiew Heong v. Public Prosecutor* [1981] 2 MLJ 287 Chan J (as he then was) had to consider whether to order a retrial. After examining the evidence adduced in that case as a whole no retrial was ordered. This was what he said at p. 288:

> The next question which I have to decide is whether or not I should order a retrial. Fortunately, I do not have to face the horns of this dilemma without the assistance of authority. In *Reid v. The Queen* [1980] AC 343, 348, PC, Lord Diplock in delivering the advice of the Privy Council said:
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> > The interest of justice that is served by the power to order a new trial is the interest of the public in Jamaica that those persons who are guilty of serious crimes should be brought to justice and should not escape it merely because of some technical blunder by the judge in the conduct of the trial or his summing up to the jury. There are, of course, counter-vailing interests of justice which must also be taken into consideration. The nature and strength of these will vary from case to case. One of

these is the observance of a basic principle that underlines the adversary system under which criminal cases are conducted in jurisdictions which follow the procedure of the common law: it is for the prosecution to prove the case against the defendant. It is the prosecution's function, and not part of the functions of the court, to decide what evidence to adduce and what facts to elicit from the witness it decides to call. In contrast the judge's function is to control the trial, to see that the proper procedure is followed, and to hold the balance evenly between prosecution and defence during the course of the hearing and in his summing up to the jury. He is entitled, if he considers it appropriate, himself to put questions to the witness to clarify answers that they have given to counsel for the parties; but he is not under any duty to do so, and where, as in the instant case, the parties are represented by competent and experienced counsel it is generally prudent to leave them to conduct their respective cases in their own way.

It would conflict with the basic principle that in every criminal trial it is for the prosecution to prove its case against the defendant, if a new trial were ordered in cases where at the original trial the evidence which the prosecution had chosen to adduce was insufficient to justify a conviction by any reasonable jury which had been properly directed. In such a case whether or not the jury's verdict of guilty was induced by some misdirection of trial judge at the trial is immaterial; the governing reason why the verdict must be set aside is because the prosecution having chosen to bring the defendant to trial had failed to adduce sufficient evidence to justify convicting him of the offence with which he has been charged. To order a new trial would be to give the prosecution a second chance to make good the evidential deficiencies in its case – and, if a second chance, why not a third? To do so would, in their Lordships' view, amount to an error of principle ... In the United States of America where new trials in criminal cases are a commonplace a similar distinction between cases in which the verdict of a jury has been set aside because of the inadequacy of the prosecution's evidence, and cases where the verdict has been set aside on other grounds, had been drawn by the Supreme Court of the United States. In the former class of case a new trial is not to be ordered in either the federal or the state jurisdictions: *Burks v. United States* [1978] 98 SCt 2141 and *Greene v. Massey* [1978] 98 SCt 2151.

To order a retrial in the instant case would be to give the prosecution a second chance to make good the inadequacy of the prosecution's evidence. This defect the prosecution could very easily remedy by not putting in evidence the cautioned statement at the second trial. It is, therefore, in the interest of justice as administered under the common law system of criminal procedure that the prosecution in the instant case should not be given another chance to cure this evidential deficiency in its case against the accused.

I will not order a retrial.

A similar course was taken in the case of *Zahari bin Yeop Baai & Anor v. Public Prosecutor* [1980] 1 MLJ 160 where Hashim Yeop Sani J (as he then was) refused to order a retrial. This was what he said at p. 163:

> Looking at the grounds of judgment I have come to the conclusion that the learned President had failed to take into account or to give sufficient consideration to every material circumstance that was in favour of the appellant available in the evidence of the prosecution witnesses themselves. Based on all the foregoing it is my view that the conviction and sentence of both the appellants should be set aside and I so order. Accordingly the cross appeals on the inadequacy of sentence are dismissed.
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> The question left is whether a retrial should be ordered. On the question of retrial the approach was settled in *Rex v. Howe* MC 109, 110 where Morrison CJ said:
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> > I have grave doubt whether the power to order a re-trial is intended to be exercised in cases where the prosecution have entirely through their own fault, failed to present their case properly. If I complied with this petition, it looks to me as if I should be ordering that an acquitted person should be tried a second time, only for this reason, that the prosecution had not used all their available armoury in launching the first prosecution.
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> It is to be noted also that although the appellants were convicted on 16 April 1976 the trial of both the appellants commenced since 19 October 1973 and the date the offence was alleged to have been committed was 13 January 1973. Under the circumstances I am of the opinion that the ends of justice do not require that the appellants should be put on trial again. There will therefore be no order of retrial.

I observe that his Lordship in that case also considered the time taken for the trial up to the conviction of the appellant. In fact in the case of *Goi Ching Ang v. Pendakwa Raya* [1998] MLJ 545 the Federal Court took into consideration the length of period when the alleged offences were committed and while the case was pending as factors in deciding whether to order a retrial. This is what his Lordship Chong Siew Fai CJ said at p. 45:

> There remains the question of retrial. We have considered the facts and circumstances of this case including the fact that the alleged offences took place more than 10 years ago, that the appellant had also been under detention and imprisoned for more than a decade and that the only evidence against the appellant on the charges was the section 27 information which we have ruled to be inadmissible, the cautioned statement of the appellant made on 30th June, 1988 having been rejected at the trial by the learned trial Judge. In all the circumstances we are of the considered opinion that this is not a proper case for ordering a retrial.

And in *Raffi Mohd Tan Abdullah v. Public Prosecutor* [1995] MLJ 119 the learned judge on appeal from the lower court took into account when refusing to order a retrial the expenses that would be incurred in bringing witnesses from Peninsular Malaysia in the event of a retrial and the inconvenience and expenses the appellant had gone through for the past five years.

Reverting therefore to the instant case I think, with the benefit of hindsight and if without the 'guidance' of the said letter, that the appropriate course that should have been taken upon hearing the 1st appeal was to order a retrial instead of calling the respondent to enter on his defence. As such and in view of what had happened there was therefore a serious misdirection whereby s. 422 of the Criminal Procedure Code would not be of any assistance.

Be that as it may, the burden has fallen upon this court to determine the issue at hand. And one way is to note the tilt after placing the relevant materials on the appropriate ends of the scale of justice. Thus at one end of the scale are the following namely:

(1) that the hearing proper of this case began on 2 December 1996 and resulting in the acquittal of the respondent on 18 March 1997 without his defence being called;

(2) that the respondent was ordered to enter on his defence on 1 August 1997 after the hearing of the 1st appeal; and

(3) that after the defence case the learned SCJ found that the prosecution failed to prove its case beyond reasonable doubt and hence acquitted the respondent on 13 November 1998.

The prosecution appealed and the hearing had to be adjourned several times due to various reasons, namely, the time constraint either on the part of the learned deputy, learned counsel and even the court being out-stationed. The hearing was finally completed on 12 November 1999. Almost three years have passed since the trial proper began.

On the other end of the scale there existed the finding of facts by the learned SCJ at the end of the whole case, namely:

(a) that the prosecution had proved that the respondent was the deputy president of the Majlis Perbandaran Sandakan (MPS) at the material time;

(b) that the prosecution had proved that the brother of the respondent applied for and obtained approval from MPS to carry out a business of selling 4-D; and

(c) that the prosecution had proved based on the evidence of the witnesses from MPS who recognised his writing and signature that the respondent approved the application of his brother.

But I noted that the learned SCJ did not make it clear whether he was satisfied that the prosecution had established beyond reasonable doubt those facts as found by him to have been proved. This ambiguity weakened any argument that the prosecution had established factual events indicating the guilt of the respondent beyond reasonable doubt at the end of the whole case. And perhaps it can be remotely implied that the learned SCJ was not satisfied beyond reasonable doubt based on the overall statement that he made in acquitting the respondent. He said thus:

> Mengambil kira perkara di atas saya mendapati pihak pendakwa telah gagal membuktikan kes tanpa keraguan munasabah dan oleh demikian saya melepaskan dan membebaskan OKT daripada tuduhan keatasnya.
>
> (Freely translated: 'Taking into account the above I am of the view that the Prosecution has failed to prove the case without reasonable doubt and as such I hereby acquit and discharge the Accused of the charge preferred against him.')

Of course it can also be said that such a fact provides another reason for an order of retrial to be made. However these are finding of facts which an appellate court should be slow to interfere. (see: *Public Prosecutor v. Wan Razali Kassim* [1970] 2 MLJ 79.)

And if indeed the trial court was not satisfied having seen the witnesses there is no cogent reason why this court as an appellate court should interfere by way of ordering a retrial.

The learned SCJ also agreed that based on 'Enactment 10 1982' the respondent as the deputy president of MPS had the power at the relevant dates to approve trading licenses under the TLO. And he accepted the evidence of the two witnesses called by the Defence, namely, Encik Wan Ramli bin Wan Daud (DW1) and Encik Husin bin Mohd. Yunus (DW2) in so far as they could relate to their work, namely, that the issuance of license for the business of selling 4-D rests with the Ministry of Finance under the Pool Betting Act 1967. But he was also of the view that the Court should be the proper forum to determine whether the license issued by the Ministry of Finance was sufficient to carry out the business of selling 4-D or that it should be based on other laws. And having considered sub-ss. 3(1) and (3) of TLO the learned SCJ held that the license for the business of selling 4-D should be under the Pool Betting Act 1967. He went on to say that MPS did not have the power to issue a trading license for the purpose of business of selling 4-D. Accordingly he held that the

respondent could not be said to have abused his position as the deputy president of MPS as he acted beyond the scope of his official capacity as such. He further held that the respondent gained nothing from the issuance of the trading license as it was invalid in the first place.

Now, having carefully examined the reasoning of the learned SCJ in ordering the acquittal of the respondent I think it can be said that his conclusion was substantially based on his interpretation of the provisions of the TLO rather than on his finding on the evidence adduced. But in view of the issue left after the concession made by the learned deputy I do not think it is now necessary for me to dwell on the point of whether or not the learned SCJ was correct in his interpretation of the relevant provisions of the TLO at the end of the whole case. Moreover, as there was an error not on procedural law but on substantive law at the end of the prosecution case, it would not have been necessary to address such an issue. But then that would invite the principle that an order of retrial should be appropriate owing to the error in law. That may be true. However, as it is a matter of discretion whether to order a retrial this court should be entitled to consider other factors as well.

For instance and as noted above, there is also still the doubt as to what standard of proof he applied in his mind when he made those finding of facts. This of course is in addition to his earlier finding at the close of the prosecution case that *prima facie* the respondent had committed corrupt practice. Hence, in such circumstances and for the reasons herein below I think it can safely be said that there would be undue prejudice to the respondent if I were to order a retrial. The scale of justice should therefore tilt in favour of the respondent. It should also be noted that the respondent has been acquitted of the charge and if a retrial were to be ordered on the basis of an error which he had nothing to do personally but left it to the professionals, including his defence counsel, that to my mind would be unfair to him considering that the case has been hanging over his head for the past several years. I think that itself should be a sufficient punishment. As in *Raffi Mohd Tan Abdullah (supra)* a retrial in this case would also involve further expenses in getting the witnesses including those from Peninsula Malaysia let alone the inconvenience and additional legal expenses that might be incurred by the respondent. And I would say that to a certain extent this situation came about consequent of the amendment of the Criminal Procedure Code and the aftermath of the said letter.

Meanwhile, I am very aware of the principle that interests of justice do not mean only the interests of an accused person. (see: *Rex v. Grondkowski* [1946] 1 KB 369). And it was held in *Mahadi v. Public Prosecutor* [1970] 1 MLJ 16 that it should not be laid at the door of the prosecution, errors which it had nothing to do. His Lordship Chang Min Tat J (as he then was) said this at p. 17:

> The prosecution ought not to be allowed, in a colloquial phrase, "two bites of the apple". But where the prosecution has adduced all the evidence it has and the evidence has established a *prima facie* case against the accused which unrebutted would warrant his conviction, then, the failure of justice occasioned by the trial president in placing the wrong burden of proof on the accused cannot be laid to the door of the prosecution. A re-trial would not be giving the prosecution a second chance to prove its case. It would merely, under such circumstances, be to uphold the rule of law. I recall a dictum of the Indian court in the case of *Abdul Rahim v. King-Emperor* LR [1964] 73 IA 77 that it is as much a miscarriage of justice to acquit a guilty man as to convict an innocent man.

But in the present case in view of what had occurred in the course of the trial and for the reasons stated herein I do not think an order of retrial is warranted. From my perusal of the Appeal Record (AR) I noted that at the close of the prosecution case there must have been confusion as to the standard of proof to be applied. But in view of what had happened I do not think those involved in the trial should be squarely blamed for it. At p. 33 of AR the learned deputy who prosecuted the case submitted to the trial court "that *'prima facie'* case has been made out." Whereas learned counsel for the respondent submitted (at p. 52 of the Appeal Record in the 1st appeal) that 'there are four ingredients to be satisfied by proof beyond reasonable doubt by the prosecution in order to establish a *prima facie* case against the accused'. And further down learned counsel continued (at p. 53 of the Appeal Record in the 1st appeal) that '(A)ll the above ingredients must be proved beyond reasonable doubt in order to constitute a *prima facie* case for the accused to answer. If any one of the ingredients is not proved beyond reasonable doubt, then the accused is entitled to be discharged and acquitted at this stage.' Frankly, what that means I am not very clear. However, there appears to have been a complete mix up and I do not think it lies with the learned counsel for the respondent to now point out that others made the error. In fact I do not find in the notes of proceeding of the 1st appeal that either the learned deputy or the learned counsel for the respondent canvassed the issue of which test to apply at the close of the prosecution case. Hence, perhaps the fair thing to say is that there has been an unfortunate error and I have already explained the circumstances surrounding the event at that point in time. But as I indicated earlier the respondent personally did not have any role in the error. As such it may be quite unfair to him if he has to bear the additional burden in term of time, anxiety and expenses if a retrial is ordered. Thus, I refused to order a retrial in the exercise of my discretion.

Finally, there is one other matter that I wish to address and it arises from the dictum of his Lordship KC Vohrah J in the case of *Mohd Amin bin Abdullah @ Kanaperan a/l Ramadass v. Public Prosecutor* [1998] 6 MLJ 122 wherein he said this at p. 128:

> The Federal Court and the Court of Appeal have identical power under the proviso to s. 92 and the proviso to s. 60, respectively, of the Courts of Judicature Act 1964 to dismiss the appeal if the court considers no substantial miscarriage of justice has occurred. The High Court has no such power but I wonder if a rule of substantive law – relating to an important right requiring a higher burden of proof on the prosecution, proof beyond a reasonable doubt at the close of the prosecution case, accruing to an accused – is breached, a substantial miscarriage of justice has not occurred?

On one hand, going by the above I may not be in the position to say that there is no substantial miscarriage of justice despite the error as to the standard of proof applied at the end of the prosecution case and thus dismiss the appeal as in the first place there is no such power given to the High Court. On the other hand even if there is power it cannot be said that there was no miscarriage of justice when the wrong standard of proof at the end of the prosecution case was relied upon. (see: *Surandran a/l Rajaretnam (supra)*). So logically I should allow the appeal. But I take comfort on the fact that his Lordship seemed to be addressing his mind on a situation where the miscarriage of justice occurred to the detriment of an accused person. Here the respondent was acquitted and thus the question of miscarriage of justice upon him does not arise. As to whether there was a miscarriage of justice to the prosecution I do not think it is necessary for me to address that issue in view of my conclusion that to order a retrial would be unduly prejudicial to the respondent. That alone would provide a serious obstacle in the exercise of my discretion to order a retrial.

Accordingly and for the above reasons that I refused to order a retrial of the respondent and it should follow that in effect the appeal is therefore dismissed.